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No. 93-1625

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTH STAR ALASKA HOUSING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND FAIRBANKS NORTH STAR BOROUGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the Administrative Procedure Act, 5 U.S.C. 702, waives the federal government's sovereign immunity for a claim seeking reformation of a government contract.

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OPINIONS BELOW

The decision of the district court (Pet. App. 20) is unreported. The opinion of the en banc court of appeals (Pet. App. 6-11) is reported at 9 F.3d 1430. The decision of the panel (Pet. App. 1-5), on remand from the en banc court, is reported at 14 F.3d 36.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1994. The petition for a writ of certiorari was filed on April 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, petitioner and the Secretary of the Army entered into an Outlease that allowed petitioner to lease a portion of the Fort Wainwright Military Reservation in Alaska for a period of 32 years. Pet. App. 7. The document stated that 10 U.S.C. 2667 authorized the Secretary to enter into the Outlease for the "sole purpose of constructing, operating and leasing 400 units of residential housing." Pet. App. 7-8. Among other things, the Outlease provided that petitioner would be responsible for any taxes assessed against the leased property. *Id.* at 8. Petitioner and the United States subsequently entered into a second lease pursuant to 10 U.S.C. 2828. Under that lease, petitioner leased the land and the residential housing back to the United States for a period of 19 years and six months. Pet. App. 8, 22.

2. When the Fairbanks North Star Borough (respondent Borough) began taxing petitioner's interest in the housing project, petitioner filed suit in district court against the United States seeking reformation of the Outlease. Pet. App. 8. Petitioner asserted that the district court had jurisdiction over the case pursuant to Article IV, § 3, Clause 2 of the U.S. Constitution, 28 U.S.C. 1331 and 5 U.S.C. 702. Pet. App. 21. Petitioner claimed that the Outlease mistakenly cited 10 U.S.C. 2667 instead of 10 U.S.C. 2828 as its statutory authority. Pet. App. 22-23. Petitioner accordingly requested that the Outlease be reformed to provide "that the Outlease is authorized under 10 U.S.C. 2828(g) for the first 20 years (plus the construction period) and for the remaining term if the Lease is renewed, and under 10 U.S.C. 2667 at

the expiration of the Lease if the Lease is not renewed." Pet. App. 23.[1]

Respondent Borough sought and was granted leave to intervene as a defendant. Pet. App. 8. Thereafter, both respondents moved to dismiss the complaint for lack of subject matter jurisdiction. *Ibid.* The district court granted the motions. *Id.* at 8, 20. It held that 5 U.S.C. 702, the provision of the Administrative Procedure Act that petitioner relied upon as waiving the United States' sovereign immunity, does not authorize district courts to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief sought. Pet. App. 15. Relying on *North Side Lumber Co.* v. *Block*, 753 F.2d 1482 (9th Cir.), cert. denied, 474 U.S. 919, 931 (1985), the district court held that the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491(a)(1), "impliedly forbids declaratory and injunctive relief and precludes a section 702 waiver of sovereign immunity in suits on Government contracts." Pet. App. 16. The district court concluded that petitioner's claim was contractual, stating that "[a] claim for reformation is in substance a claim that the parties have a contract not correctly reflected in the written memorialization of the contract, so the written memorialization needs to be reformed in order to reflect what was truly agreed upon between the parties." *Id.* at 17. The court accordingly found that the claim was not cognizable under the Administrative Procedure Act. The district court recognized that this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), "certainly gives rise to doubt, but the procedural context

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[1] In petitioner's view, if 10 U.S.C. 2828 is the statutory basis for the Outlease, respondent Borough would not be permitted to assess taxes on petitioner's interest in the leased property and buildings.

of *Bowen* and the factual context [here] is [*sic*] quite distinguishable." Pet. App. 18.

3. Petitioner appealed. After oral argument, but before the panel issued a decision, the Ninth Circuit ordered that the case be reheard en banc to resolve an intra-circuit conflict on whether district courts have jurisdiction over contract claims. Pet. App. 12; *id.* at 7. In a per curiam opinion, the en banc court reaffirmed its prior decision in *North Side Lumber Co.*, which had held that the Administrative Procedure Act does not allow district courts to exercise jurisdiction over equitable claims against the government based on contract rights, as opposed to those based on statutory rights. Pet. App. 10. The en banc court also ruled that this Court's decision in *Bowen* did not affect the analysis because *Bowen* "was not a contract case. Accordingly, the Court was not called upon to address section 702's 'impliedly forbids' limitation on the waiver of sovereign immunity." *Ibid.* The en banc court remanded the case to the panel for determination of whether petitioner's claim was contractually or statutorily based. *Id.* at 11.

4. On remand, the panel concluded that petitioner's claim was contractual and affirmed the district court's decision to dismiss the case. Pet. App. 5. The court of appeals reached its decision by examining the source of the rights upon which the petitioner based its claim. *Id.* at 3. The court ruled that petitioner's right to have the Outlease reformed arose only if that was the original intention of the parties. Since petitioner's right to reformation was therefore based upon the contract, the district court lacked jurisdiction to hear that claim. *Id.* at 3-4.

The court of appeals rejected petitioner's argument that it had asserted a statutory claim. Pet. App. 4 n.2. The court also rejected petitioner's argument, based in

part on *Bowen*, that the district court could not refuse jurisdiction if there was no alternative forum available to hear petitioner's claim. *Id.* at 4-5. The court noted that *Bowen* involved the interpretation of Section 704 of the APA, which requires judicial review of "final agency action for which there is no other adequate remedy in a court." Pet. App. 4, quoting 5 U.S.C. 704. The court also recognized that *Bowen* "did not involve a contract and it did not address the 'impliedly forbids' limitation on the Administrative Procedure Act's waiver of sovereign immunity." Pet. App. 5. The court stated that "it would make little sense to grant jurisdiction over a claim pursuant to § 704 on the ground that jurisdiction for that same claim is expressly or impliedly forbidden under § 702." *Ibid.*

ARGUMENT

1. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Moreover, when the government does consent to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), citing *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941), and any waiver of sovereign immunity must be strictly construed. *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992).

a. The Tucker Act provides a waiver of sovereign immunity for claims against the United States "founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1346(a)(2), 1491(a)(1). Tucker Act jurisdiction is limited to claims for monetary relief, see *Richardson* v. *Morris*, 409 U.S. 464, 465 (1973) (per curiam), and equitable claims may be heard under the

Tucker Act only in conjunction with such money claims, see *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1316-1317 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979). The Administrative Procedure Act (APA) waives the government's sovereign immunity for claims seeking "other than money damages." 5 U.S.C. 702. However, Section 702 of the APA notes a specific exception: in circumstances in which another statute "expressly or impliedly forbids" the relief being sought, the government's sovereign immunity is not waived.

In construing the "impliedly forbids" proviso of Section 702, the court of appeals reaffirmed the principle that district courts do not have jurisdiction to order equitable relief based on government contracts, because such relief is impliedly forbidden by the Tucker Act. See *North Side Lumber Co.* v. *Block*, 753 F.2d 1482 (9th Cir.), cert. denied, 474 U.S. 919, 931 (1985). The other courts of appeals that have addressed this question are in accord. See, *e.g.*, *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *Eagle-Picher Indus., Inc.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise made by agency not within district court's jurisdiction); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) ("The sole remedy for an alleged breach of contract by the federal government is a claim for money damages.").[2]

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[2] Petitioner errs in asserting (Pet. 11) that there is a conflict between the decision of the court of appeals in this case and the Federal Circuit's decision in *Katz* v. *Cisneros*, 16 F.3d 1204 (Fed.

b. Petitioner nonetheless asserts that the court of appeals' decision conflicts with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, the State of Massachusetts sued the Secretary of Health and Human Services (HHS), seeking reimbursement for a category of expenditures under the State's Medicaid program. This Court first held that the APA's exclusion of actions for "money damages" in Section 702 did not bar an order reversing an agency decision premised on a misinterpretation of the law and disallowing benefits mandated under a federal statute. 487 U.S. at 900. This Court then addressed whether the Court of Federal Claims could provide an adequate remedy and whether review in the district court would therefore be precluded on the basis of Section 704, which bars judicial review of "final agency action" if there is "[an]other adequate remedy in a court." 5 U.S.C. 704. This Court found that there was no other adequate remedy for the statutory claim raised in *Bowen*, and that judicial review was therefore not precluded by Section 704. 487 U.S. at 901.

As the court of appeals below and other circuits have recognized, *Bowen* was not a contract case, but involved review of final agency action interpreting a statute.[3] Pet. App. 5, 10; *Transohio Sav. Bank* v. *Director, Office of*

Cir. 1994). In *Katz*, the plaintiff had pleaded various contract claims, but in fact did not have a contract with, nor was it a third-party beneficiary of a contract with, the United States. The *Katz* court explicitly stated that the case before it was "not a contract case." 16 F.3d at 1209. It also stated that "[t]o the extent that [plaintiff] has raised contract claims against HUD in its complaint, contract remedies are not available." *Id.* at 1210.

[3] The claim in *Bowen* turned on the interpretation of a federal statute that required HHS to reimburse certain state expenditures for rehabilitative services for the mentally retarded. 487 U.S. at 885-886 & n.6.

Thrift Supervision, 967 F.2d 598, 611-613 (D.C. Cir. 1992); *Coggeshall Dev. Corp.* v. *Diamond*, 884 F.2d 1, 5 (1st Cir. 1989); *Eagle-Picher Indus., Inc.*, 901 F.2d at 1532 n.1. Accordingly, in *Bowen* this Court did not address the question of whether the Tucker Act "expressly or impliedly forbids" equitable relief based on a contract so as to preclude judicial review under Section 702's narrow exception. There is thus no inconsistency between the court of appeals' decision in this contract case and the decision in *Bowen*.[4]

c. Petitioner also asserts (Pet. 12-13) that *Bowen*'s teachings "should apply with equal or greater force where a litigant seeks equitable relief unavailable before the court of federal claims and must litigate in district court or not at all." Petitioner essentially suggests that, unless it has an adequate remedy in the Court of Federal Claims, it must be able to obtain judicial review in the district court under the APA.

Although Section 702 provides generally for the waiver of the government's sovereign immunity in actions seeking "other than money damages," the final sentence of Section 702 provides an exception for situations in which "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." At the same time, Section 704 generally precludes judicial review of "final agency action for which there is [an] adequate remedy in a court." The language and structure of the statute, as well as this Court's decision in *Bowen*, indicate that Section 704 is not an

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[4] Petitioner is correct in its assertion (Pet. 10) that both the court below and the D.C. Circuit have stated that they would not overrule their pre-*Bowen* decisions without more direction from this Court. There is, however, no conflict among the circuits on this question that this Court needs to resolve at this time.

independent waiver of sovereign immunity, but is meant to provide a limitation on Section 702's general waiver. Section 704's "primary thrust * * * was to codify the exhaustion requirement," but it also "makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. There is no indication that Section 704 in any way overrides Section 702's "expressly or impliedly forbids" exception.[5]

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[5] Petitioner also asserts (Pet. 11) that the court of appeals' decision failed to "correctly interpret the extent of the waiver of sovereign immunity intended by Congress when it amended 5 U.S.C. § 702 in 1976." The legislative history of the 1976 amendments to the APA, however, fully supports the decision reached by the court below. In fact, that legislative history uses equitable relief on a contract as the example of relief unavailable under the APA:

> Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.

H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12-13 (1976) (footnote omitted).

2. Petitioner also argues (Pet. 19) that the court of appeals erred in holding that petitioner's claim was contractual. As the court of appeals understood, to determine whether a claim is contractual or statutory a court must consider the nature of the rights that are asserted and the type of relief that is sought or is appropriate. See *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982). This inquiry necessarily turns on the particular facts of each case. For this reason, even if the court of appeals had erred in characterizing petitioner's claim as "contractual," further review would not be warranted.

In any event, the court of appeals' determination was correct. As the court of appeals recognized, petitioner seeks "reformation" of the Outlease to avoid liability for property taxes. Pet. App. 8. The obligation that petitioner seeks to avoid accordingly arose out of its contractual relationship with the United States.[6] Further, as the court of appeals also recognized, the remedy petitioner seeks is contractual in nature. Reformation is an equitable remedy intended to "reframe written contracts to reflect accurately [the] real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by [the] other party, the writing does not embody [the] contract as actually

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[6] Petitioner wrongly describes (Pet. 11) the court of appeals' decision as holding that the district court lacked APA jurisdiction to review petitioner's claim asserting statutory and constitutional violations "simply because that claim involves a contract with the United States." The *presence* of a contract, however, was not determinative. Rather, the court of appeals looked to the source of petitioner's rights, which in this case was the contract, and rejected petitioner's argument that it had alleged a statutory violation.

made." *Black's Law Dictionary* 1281 (6th ed. 1990). See also *American President Lines, Ltd.* v. *United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987).

Contrary to petitioner's assertions (Pet. 19), petitioner has not alleged constitutional and statutory violations. The only reference to the Constitution in the complaint was to Article IV, § 3, Clause 2, which was cited as a basis for jurisdiction.[7] With regard to petitioner's claims of statutory violations, the court of appeals correctly stated that petitioner's "argument must be that the government's failure to comply with [10 U.S.C.] 2667 is *evidence* that a different statute was intended to authorize the Outlease. The claim is not that the government was violating the law, the claim is that the government is following a different law from the one stated in the contract." Pet. App. 4 n.2.[8]

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[7] That clause provides that

> [t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[8] Petitioner argues (Pet. 19) that courts have allowed claims "akin" to its reformation claim to be heard in district court. Of the four decisions cited by petitioner, two were decided by appellate courts. One of those, *Laguna Hermosa Corp.* v. *Martin*, 643 F.2d 1376 (9th Cir. 1981), was decided by the Ninth Circuit. Even assuming a conflict between Ninth Circuit decisions, further review in this Court would not be warranted. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). The other appellate decision, *Choctaw Mfg. Co.* v. *United States*, 761 F.2d 609 (11th Cir. 1985), involved a suit brought by an unsuccessful bidder, who by definition had no contract with the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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